

E. Timor Treaty
Submission No: 22

phillips
fox

31 July 2002

Secretary
Joint Standing Committee on Treaties
Parliament House
CANBERRA
By hand

Phillips Fox Building
64 Marcus Clarke Street
GPO Box 172
Canberra ACT 2601
Australia
DX 5724 Canberra
Tel +61 2 6201 8787
Fax +61 2 6230 7848
www.phillipsfox.com

Adelaide
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PROPOSED TIMOR SEA TREATY

Herewith a Submission by me to the Committee on the above Treaty.

Yours sincerely



Pat Brazil
Special Counsel
Direct +61 2 6201 8723
Email pat.brazil@phillipsfox.com

Submission No:



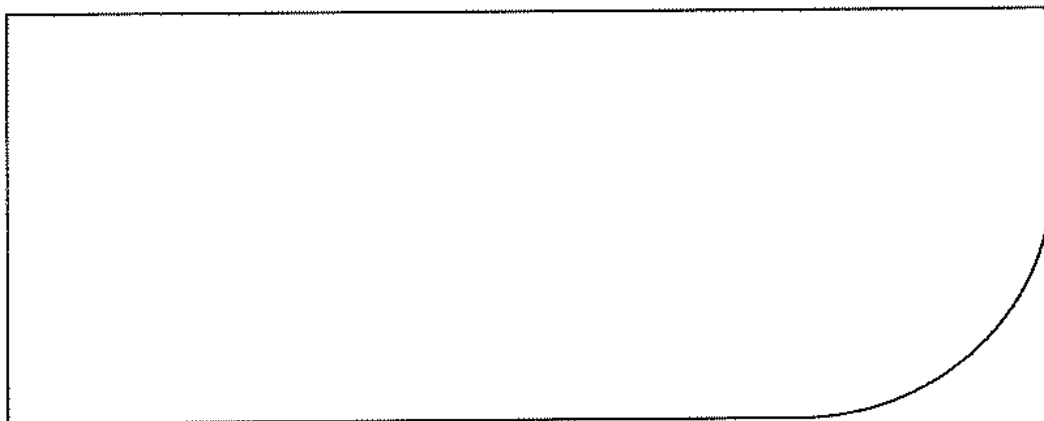
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**SUBMISSION TO JOINT STANDING COMMITTEE ON
TREATIES**

ON

**PROPOSED TIMOR SEA TREATY BETWEEN THE
GOVERNMENT OF AUSTRALIA AND THE GOVERNMENT
OF THE DEMOCRATIC REPUBLIC OF EAST TIMOR**



SUBMISSION

This submission comments on certain international legal aspects that may assist the Committee's consideration of the Proposed Treaty. I mention, by way of background, that I was a member of the Australian delegation that in 1972 negotiated what became the Agreement between Australia and Indonesia establishing certain seabed boundaries in the Timor and Arafura Seas (Australian Treaty Series 1973, No 32). I am presently advising on the international legal aspects of provisional joint development proposals currently being considered by Cambodia and Thailand in relation to their overlapping seabed claims in the Gulf of Thailand.

1 The Obligation of Both Parties to Seek Agreement on the Continued Development of the Petroleum Resources of the Seabed in Question

1.1 The preamble of the Proposed Treaty recognises the benefits that will flow to both Australia and East Timor by providing a continuing basis for petroleum activities proceeding as planned. In this context, the preamble goes on to refer to -

- that part of Article 83 of the United Nations Convention on the Law of the Sea (UNCLOS) which provides that delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law (Art 83.1), and also
- that part of Article 83 which provides that, pending an agreed delimitation, every effort shall be made, in a spirit of understanding and co-operation, to enter into provisional arrangements which do not prejudice the final determination of the seabed delimitation (Art 83.3)

1.2 What I wish to draw to the Committee's attention is that this injunction in Article 83.3 requiring countries with continental shelf delimitation problems to "make every effort" to enter into provisional arrangements of a practical character, pending delimitation, has a legal as well as practical character. That character has been accurately described as not being merely a non-binding recommendation or encouragement but as a mandatory rule whose breach would represent a violation of international law: LAGONI¹ at 354.

1.3 Also, the direction in Article 83.3 that these efforts be made "in a spirit of understanding and cooperation" reflects the traditional legal concept of "good faith" recognised by international law as applying throughout international

¹ Rainer Lagoni, Director of the Institute of the Law of the Sea and Maritime Law, University of Hamburg, *Interim Measures Pending Maritime Delimitation Agreements*, 78 Am. J of Int Law 345 (1984).

relations and it has particular importance in the Law of Treaties, UNCLOS of course being a treaty.

- 1.4 It is also instructive to look at the discussions at the United Nations Conference of the Law of the Sea on what became Article 83 of UNCLOS (and the corresponding Article 74 concerning Exclusive Economic Zones). As pointed out by LAGONI at 351 they show the following:

“The provisions on such interim measures were not primarily concerned with preventing possible damage by restraining the activities of neighbouring coastal states in the un-delimited zones. Instead, they were designed to promote interim regimes and practical measures that could pave the way for provisional utilization of such areas pending final delimitation.”

- 1.5 The Committee may also wish to note that these discussions referred to by LAGONI show also that a suggestion that provisional measures should take the form of refraining from exercising jurisdiction beyond the **median** or **equidistance** line was rejected. This has relevance of course for the northern boundary of the Joint Petroleum Development Area (JPDA) to be set up under the Proposed Treaty, which reflects Australia’s claim to seabed extending to the Timor Trough.

2 Lateral Boundaries of the JPDA

- 2.1 Recent criticism of the (JPDA) has focussed on the **lateral** boundaries. In this regard I refer to a well publicised Opinion by Professor Lowe and others dated 11 April 2002. I refer also to the Appendix to that Opinion consisting of a chart of the Timor Sea area, showing so-called “median” lines that would significantly extend laterally the area attributed to East Timor – see **Attachment 1**. Thus, the eastern extension would have the effect of including the whole of the Sunrise deposit in the area pertaining to East Timor, whereas under the Proposed Treaty boundaries only 20.1% lies within the JPDA.
- 2.2 This can only be done by giving less than full value to relevant **Indonesian** features. On the basis that a picture is better than a thousand words, I attach in this regard, as **Attachment 2**, another chart entitled “Timor Sea - Overview” by an expert geographer familiar with the areas in question. That chart in effect corrects the chart appended to the Lowe Opinion in relation to median lines. It shows true median lines that take all relevant features fully into account, and demonstrates clearly that the so-called “median” lines proposed in the Lowe chart would involve giving only partial effect to Indonesian features.
- 2.3 The suggestion that Indonesian features need not be given full effect is particularly surprising as the alternative lateral boundaries proposed involve discounting the effect of features forming part of the Indonesian Archipelago. In view of Indonesia’s well-known claim that its archipelagic baselines are to be treated as enclosing an intrinsic geographical entity (a claim recognised by Part

IV of UNCLOS), to propose lateral boundary lines based on discounting Indonesian features is quite unrealistic.

- 2.4 The "Timor Sea - Overview" chart in **Attachment 2** also confirms that the lateral boundaries of the JPDA substantially coincide with median lines that take all relevant features into account.
- 2.5 The lateral boundaries of the JPDA also receive confirmation from an interesting source namely the Petrotimor/Oceanic Exploration concession in the Timor Sea that was granted by Portugal in 1974. This is shown by the chart in **Attachment 3**, which is based on an Oceanic Exploration source. The lateral boundaries of the concession and the JPDA substantially coincide.
- 2.6 In all these circumstances, the Treaties Committee should proceed on the basis that the boundaries of the JPDA, including the lateral boundaries, constitute the appropriate way of giving effect - areawise - to the obligations of both Australia and East Timor under Article 83.3 relating to provisional measures.

3 Unitisation

- 3.1 It is a common and proper feature of treaties dealing with seabed delimitation or provisional arrangements to include provisions addressing the need for unitisation arrangements where a common deposit straddles the boundaries or limits laid down. This practice of negotiating and seeking agreement on the exploration and exploitation of a common deposit and the apportionment of the minerals extracted may well have given rise to a customary rule of current international law to that effect. In the present case, the main common deposit is Sunrise, as is shown in all the charts contained in the Attachments hereto.
- 3.2 The importance of resolving these matters has been recognised in the Proposed Treaty in Article 9 and in Annex E to the Treaty. In particular:
- It is agreed under Article 9(a) of the Treaty that any reservoir of petroleum that extends across the boundary of the JPDA shall be treated as a single entity for management and development purposes.
 - Under Annex E Australia and East Timor agree to unitise the Greater Sunrise on the basis that 20.1% of Greater Sunrise lies within the JPDA and that production shall be distributed on that basis (para (a)).
 - Under paragraph (d) of Annex E, in the event of a permanent delimitation any new agreement is to preserve the terms of any production sharing contract, licence or permit which is based on the agreement in paragraph (a).
- 3.3 It is not going too far to say that the practical, if not the legal, effect of this is that an agreed unitisation arrangement for Sunrise (under Annex E) would be a condition precedent to bringing the Proposed Treaty into force. The same

considerations would also apply to the other reservoirs that extend across the
boundary of the JPDA.



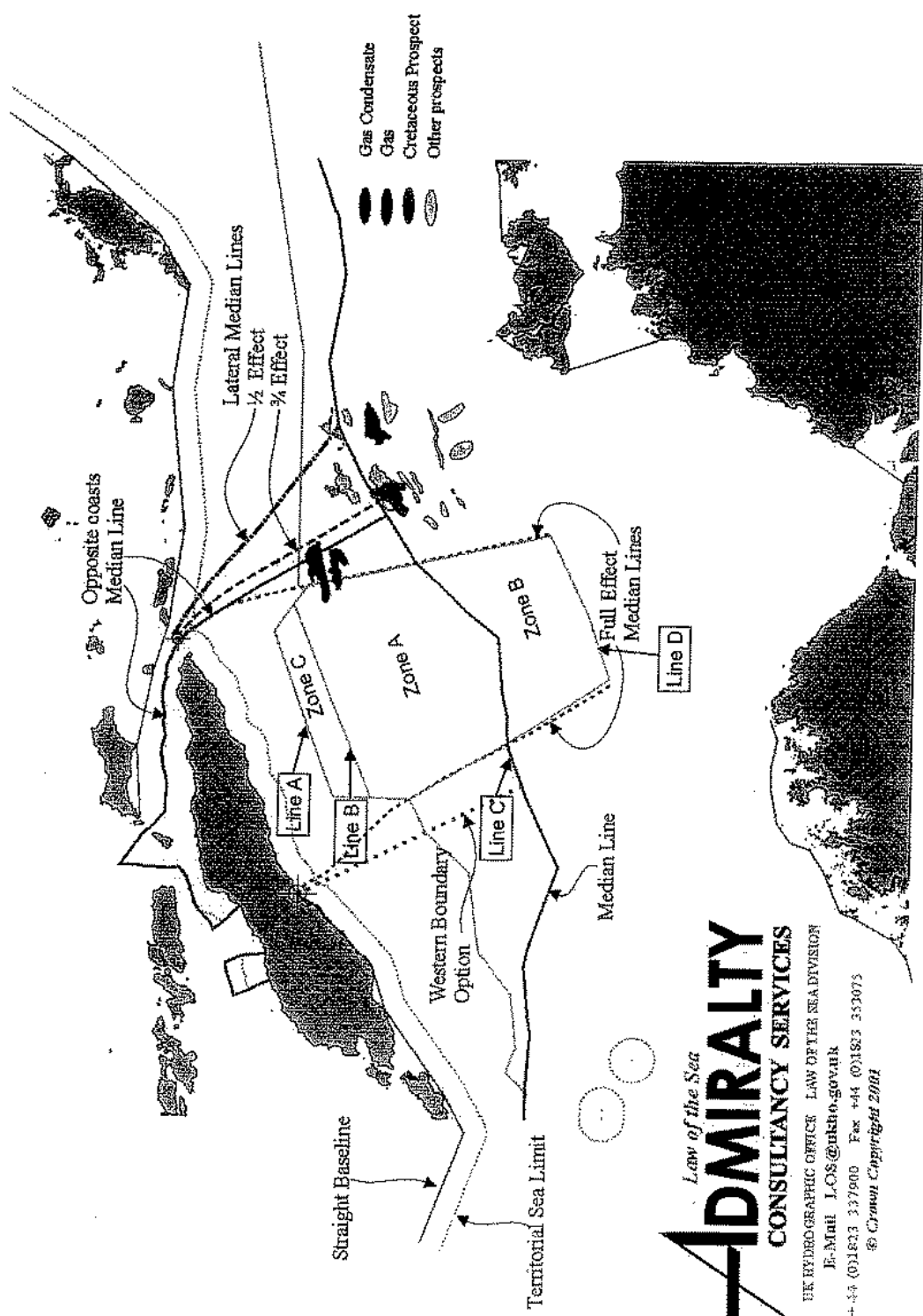
Pat Brazil
Special Counsel
Direct +61 2 6201 8723
Email pat.brazil@phillipsfox.com

31 July 2002

LOWE OPINION

APPENDIX

(See Paragraph 15 above)



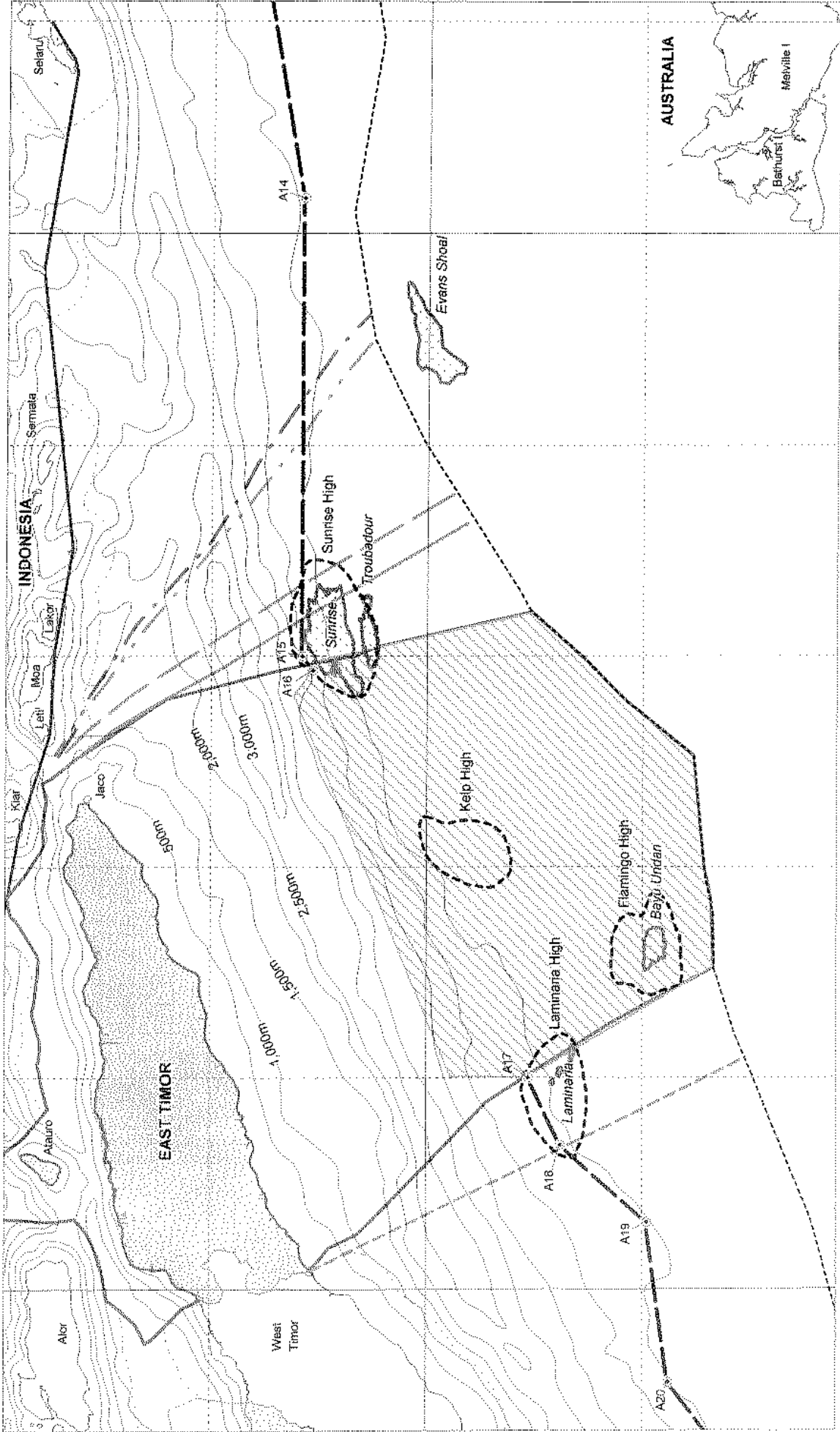
Law of the Sea

ADMIRALTY

CONSULTANCY SERVICES

THE HYDROGRAPHIC OFFICE - LAW OF THE SEA DIVISION
 E-Mail: L.OS@ukho.gov.uk
 Tel: +44 (0)1833 337000 Fax: +44 (0)1833 333075
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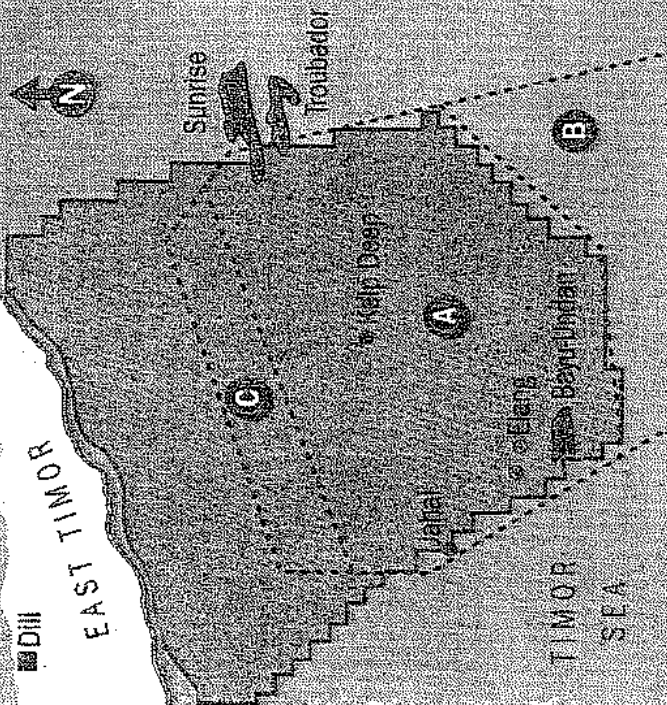
TIMOR SEA - OVERVIEW



LEGEND

- Indonesia Archipelagic Baselines
- Agreed Seabed Boundary (Aust & Indon)
- Australia Exclusive Economic Zone
- East Timor Median Line (all features equal weight)
- Low Opinion (half effect)
- Low Opinion (three quarter effect)
- Low Opinion (western boundary option)
- Joint Petroleum Development Area
- Indonesia Territorial Sea (archipelagic baseline)
- Indonesia Territorial Sea (normal baseline)

OCEANIC EXPLORATION CLAIM AREA



● Dili

● Bayu Ujan
Estimated gas reserves:
3.4 trillion cubic feet.

Lies fully within the zone of co-operation between Australia and East Timor.
Operator: Phillips Petroleum.

● Sunrise

Estimated gas reserves:
9.16 trillion cubic feet.

About 20 per cent lies within the zone of co-operation.

Operator: Woodside Petroleum.

Zone of Co-operation

Area A: Shared zone

Area B: Australian waters

Area C: Indonesian waters

Claim made January 1976

● The final agreement will involve either an 85:15 revenue split (favoured by Australia) or a 90:10 split (favoured by East Timor) between the two countries. A 50:50 split had earlier been agreed with Indonesia.

● In round terms, if the two gasfields are pooled, East Timor is entitled to about half the total royalties.

Source: Oceanic Exploration